Office - Supreme Court, U.
FILED
APR 9 1942
CHARLES ELMORE CROPL
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

NO. 932

EDMOND L. VILES, and
FRANCES N. VILES,
Petitioners,
vs.
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Respondent.

On Petition for Review on Writ of Certiorari to The Circuit Court of Appeals for the Tenth Circuit.

PETITION FOR REHEARRING

EDMOND L. VILES, Pro se
FRANCES N. VILES, Pro se
Petitioners
GOLDEN, COLORADO

SUBJECT INDEX

page

BRIEF OF ARGUMENT 1

1. Equity has no jurisdiction in an action alleging breach of contract by insurer to pay disability benefits periodically and demanding judgment for money due on contract and for specific performance over a period of years. 2

2. Specific performance of a contract and protracted supervision over aperiod of years is not cognizable in Equity 3

3. Specific performance of a contract will not be decreed in Equity if it is not a mutual remedy 4

4. Court sitting without a jury where there is a right to a jury trial which has not been waived, has no jurisdiction and the decree is void, a jury being a necessary constituent part of the court itself 5

5. Where an Action at Law in a State Court is removed to a Federal Court by defendant, and tried as a suit in Equity without a jury where jury trial is not waived, the Findings of Fact and Decree are void 6

6. Circuit Court of Appeals cannot be an advocate for defendant by interposing a defense not pleaded by defendant 7

7. If insured by mistake pursued a non-existent remedy to adverse judgment in the first action, he is not thereby precluded from pursuing an appropriate remedy, (See original Brief)

CONCLUSION 9

CASES REFERRED TO

Aetna L. Ins. Co. v. Davis, Ark., 60 S.W. (2) 912 3
Allen v. National L. & Ac. Ins. Co., Mo., 67 S.W. (2) 534 3
Arizona Edison Co. v. Southern Sierras P. Co., 17 F. (2) 739, C. D. 4
Atlantic Ins. Co. v. Serio, Miss. 157 S., 474 3
Aufdenkamp v. L'Herrison, 56 F. (2) 344 6
Benedict v. Williams, 10 F. 208 7
Bottemiller v. Ball, 279 P. 542, 69 A. L. R. 951 6

Buis v. Prudential Ins. Co. 77 S.W. (2) 127 3
Conn v. Rowe, 153 N.E. 537, Mass., 48 A.L.R. 762 5
Daniels v. Brown Shoe Co., 77 F. (2) 899 4
Elec. Mo. Corp. v. United P.&L. Corp., 19 F. (2) 311, Eighth Circuit 5
Engemeon v. Rea et al, 26 F. (2) 576, C.D., Tenth Circuit 4
Gen'l Elec. Co. v. Westinghouse Elec. & Mfg. Co., 144 F. 458 4
Green v. Creighton, 48 Am. Dec., 742 6
Henderson Tire & R. Co. v. Gregory, 16 F. (2) 589, 49 A.L.R. 1503 7
Hertz v. Mills, 10 F. supp. 979, affirmed 82 F. (2) 1010.. 7
Hines v. Fidelity Mut. L. Ins. Co., D.C., 6 F. supp. 114.... 3
Home Life Ins. Co. v. Ward, Ark., 75 S.W. (2) 379 3
Javarierre v. Central Allagarcia, 217 U.S. 502 4
Jordan v. Equitable L. Ass. Soc., S.C., 169 S.E., 673 3
Kilheart v. Metropolitan L. Ins. Co., D.C., 1 F. supp. 719 3
Kimel v. Mo. State L. Ins. Co., 71 F. (2) 921 Tenth Circuit 3
Magee v. Magee, 99 Am. Dec. 571, Ill. 6
Marble Co. v. Ripley, 10 Wall 339 5
Menssen v. Travelers Ins. Co., D. C., 5 F. supp. 114 3
Metropolitan L. Ins. Co. v. Schneider, Ind., 193 N.E. 690 3
National Mut. L. Ins. Co. v. Hicks, Tex., 65 S.W. (2) 805 3
Odeo ne v. Prudential Ins. Co., S.C., 179 S.E., 669 3
Pantages v. Grauman, 191 F. 317, Ninth Circuit 5
Prudential Ins. Co. v. Sweet, Ky., 69 S.W. (2) 748 3
Robins v. Travelers L. Ins. Co., N. Y., 269 N.Y.S. 841.... 3
Sanders v. Universal L. Ins. Co., Tex., 74 S.W. (2) 301.. 3
Shubert v. Woodward, 167 F. 55 5
Smith v. Bourbon C., 127 U.S. 105; 32 L.Ed. 73; 8 Sup. Ct. 1042 6
State v. Bates, 61 P. 905, Utah 5
Tausig v. Corbin, 142 F. 660, Third Circuit 5
Texas & Pac. R.R. Co. v. City of Marshall, 136 U.S. 405.. 4
Thompson v. Central Ohio R.R. Co., 73 U.S. 134, 18 L.Ed. 763 7
United Fuel Gas Co. v. Smith Oil Corp., 41 F. (2) 4 4
Touey v. New York L. Ins. Co., 102 F. (2) 16 C.D. 6
York Haven P. & W. Co. v. York Haven P. Co., 205 F. 270 4
32 C.J. 296, p. 194 5
36 Cyc. 581 5
81 A.L.R. 381, 99 A.L.R. 1172 3
28 U. S. C. A. 81, Note 54, 55 and 57 7
19 Am. Jur. p. 55, sec. 26, Note 1 6
19 Am. Jur. p. 122, sec. 121 6
31 Am. Jur. p. 562, sec. 11 6
18 Am. Jur. p. 168, sec. 53 7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

NO. 932

EDMOND L. VILES, and
FRANCES N. VILES,
Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Respondent.

On Petition for Review on Writ of Certiorari to The Circuit Court of Appeals for the Tenth Circuit.

PETITION FOR REHEARRING

This honorable Court has inadvertently overlooked or has misapprehended the conflicts in the instant opinion with the opinions of other Circuit Courts of Appeal, and the opinions of this Court involving fundamental law and the public interest.

The heart of the controversy briefly stated is: That insured has been unlawfully denied his constitutional right of a trial by jury on Issues of Fact, on the ground that Findings of Fact and Decree entered by a Chancellor in a former action between the same parties is a bar to this action.

PETITIONERS CONTEND THAT THE SAID FINDINGS OF FACT AND DECREE ARE VOID ON THEIR FACE, BECAUSE THERE WERE NO EQUITY JURISDICTIONAL AVERMENTS IN THE FORMER COMPLAINT AND THAT EQUITY JURISDICTION CANNOT BE CONFERRED BY CONSENT OR WAIVER, AND THERE IS NO WRITTEN WAIVER OF A JURY IN THE RECORD.

AND A COURT SITTING WITHOUT A JURY WHERE THERE IS A RIGHT TO A JURY TRIAL WHICH HAS NOT BEEN WAIVED, HAS NO JURISDICTION OF THE CASE AND THE DECREE IS VOID, THE JURY BEING A NECESSARY CONSTITUENT PART OF THE COURT ITSELF.

AND FOR GREATER PARTICULARITY PETITIONERS ALLEGE:

CONFLICT NO. 1

The opinion in the instant case holds: That when an insurer wrongfully repudiates or breaches its contract to pay disability benefits periodically, the insured may institute a proceeding in equity demanding judgment for money due on contract, and for a specific performance and for protracted supervision over a period of years, and if insured fails in such action, he cannot thereafter pursue his alternative remedy at law.

This holding is in direct conflict with the following opinions of both State and Federal Courts which hold:

Where an insurer wrongfully repuliates or breaches its contract to pay disability benefits periodically the insured has but two remedies, both legal:

1. That the insured may sue for all installments in default, or

2. Insurer may consider the policy at an end and sue insurer for all damages resulting from the said breach, including all future installments based on life expectancy, under the doctrine of "Anticipatory Breach."

Opinions holding to the first remedy,
Kimel v. Mo. State L. Ins. Co., 71 F (2) 921 Tenth Circuit.
Kilheart v. Metropolitan L. Ins. Co., D.C., 1 F supp. 719
Hines v. Fidelity Mut. L. Ins. Co., D.C., 6 F. supp. 692
Menssen v. Travelers Ins. Co., D.C., 5 F supp. 114
Jordan v. Equitable L. Ass. Soc., S.C., 169 S.E., 673
Odeorne v. Equitable L. Ass. Soc., S.C., 169 S.E., 673
Atlantic L. Insl Co., vs. Serio, Miss. 157 S., 447
Allen v. National L. & Ac. Ins. Co., Mo., 67 S.W., (2) 534
Buis v. Prudential Ins. Co., 77 S.W. (2) 127
81 A. L. R. 381, 99 A. L. R. 1172

Opinions holding to the second remedy:
National Mut. L. Ins. Co., v. Hicks, Tex., 65 S.W. (2) 805
Robins v. Travelers L. Ins. Co., N.Y., 269 N.Y.S. 841
Metropolitan L. Ins. Co. v. Schneider, Ind., 193 N.E. 690
Prudential Ins. Co. v. Sweet, Ky., 69 S.W. (2) 748
Home L. Ins. Co. v. Ward, Ark., 75 S.W. (2) 379
Sanders v. Universal L. Ins. Co., Tex. 74 S.W. (2) 301
Aetna L. Ins. Co. v. Davis, Ark., 60 S.W. (2) 912

The following opinions hold that specific performance of a contract calling for successive acts or protracted supervision over a period of years, is not cognizable in Equity:

Engemeon v. Rea, et al, 26 F. (2) 576, C. D. Tenth Circuit

Arizona Edison Co. v. Southern Sierras P. Co., 17 F. (2) 739, C.D.

United Fuel Gas Co. v. Smith Oil Corp., 41 F. (2) 4

Daniels v. Brown Shoe Co., 77 F. (2) 899

York Haven P. & W. Co. v. York Haven P. Co., 205 F. 270

United Cigarette Machine Co. v. Winters C. Mack Co. 194 F. 947

Javarierre v. Central Allegracia 217 U.S. 502

Texas & Pac. R. R. Co. v. City of Marshall, 136 U. S. 405

The following opinions hold that equity will not decree specific performance of a contract where it is not a **mutual** remedy,

Engemeon v. Rea et al, supra, (Opinion by Judge Phillips)

Strong v. Richmond P. and C. R. Co., 101 F. 511, Fourth Circuit

General Electric Co. v. Westinghouse Electric & Mfg. Co., 144 F. 458

Elec. Mo. Corp. v. United P. & L. Corp., 19 F (2) 311, Eighth Circuit

Shubert v. Woodward, 167, F. 55

Marble Co. v. Ripley, 10 Wall 339

Pantages v. Grauman, 191 F. 317, Ninth Circuit

Tausig v. Corbin, 142 F. 660, Third Circuit
32 C. J. 296, p. 194
36 Cyc. 581

CONFLICT NO. 2

The opinion in the instant case holds: That where there is a diversity of citizenship, and the amount in controversy exceeds $3,000, less interest and costs a Federal Court has jurisdiction of the subject matter and the parties, and if the Court makes a mistake and tries an Action at Law as a Suit in Equity, without a jury, where there are no Equity Jurisdictional Averments in the Pleadings, and there is no waiver of a jury, Equity Jurisdiction is considered conferred by consent or waiver if not objected to by defendant **in Limine.**

The above quotation from the instant opinion is in direct conflict with the following opinions which hold that where there are no Equity Jurisdictional Averments in the Complaint, Equity Jurisdiction cannot be conferred by consent or waiver, and Findings of Fact and Decree by a Chancellor are void, and that a court sitting without a jury where there is a right to a jury trial which has not been waived, has no jurisdiction of the case and the decree is void, the jury being a necessary constituent part of the court itself:

Conn v. Rowe, 153, N.E. 537, Mass., 48 A.L.R. 762

State v. Bates, 61 P. 905, Utah

Smith v. Bourbon Co., 127 U. S. 105, 32 L. ed. 73, 8 S. Ct. 1043

Mageev v. Magee, 99 Am. Dec. 571, Ill.

Green v. Creighton, 48 Am. Dec. 742

Bottemiller v. Ball, 279 P. 52, 69 A.L.R. 951
31 Am. Jur. p. 562, sec. 11
19 Am. Jur. p. 122, sec. 121
19 Am. Jur. p. 55, sec. 26, Note 1

Touey v. New York L. Inc. Co., 102 F. (2) 16 C.D.

In Aufdenkamp v. L'Herrison, 56 F. (2) 344, the Circuit Court of Appeals held: Equity has no jurisdiction where main cause of action is legal if complainant has full and adequate legal remedy . . . . . Litigants acquiesence does not amount to waiver of objection that Equity has no jurisdiction when bill shows on its face, lack of jurisdictional averments.

In Touey v. New York L. Ins. Co., 102 F. (2) 16, C. D., the Circuit Court of Appeals held: Where a cause of action cognizable at Law is entertained in Equity on ground of some equitable relief sought, which it develops cannot be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.

CONFLICT NO. 3

The opinion in the instant case ignores petitioner's contention that in the first action, insured was entitled to a jury trial on Issues of Fact in the State Court, and therefore he could not be denied a jury trial in the Federal court after removal by defendant, and if jury trial is denied, the Findings of Fact and Decree by a Chan-

cellor are void, which contention is supported by the following authorities:

Thompson v. Central Ohio R. R. Co., 73 U.S. 134, 18 L. Ed. 763

Benedict v. Williams, 10 F. 208
28 U. S. C.A. 81, Note 54, 55 and 57

Sec. 191, Colorado Code of Civil Procedure provides: Issues of Fact in all actions for breach of contract, or for money due on contract, must be tried by jury unless jury trial is waived.

CONFLICT NO. 4

The opinion in the instant case holds: That insured elected his remedy in Equity in the first action and failed, and cannot now pursue his alternative remedy at Law, notwithstanding, defendant did not plead "election of remedy" as a bar to this action. The above quotation is in direct conflict with the following opinions which hold that Circuit Courts of Appeal cannot be an advocate for defendant by interposing a defense not pleaded by defendant:

Henderson Tire & R. Co. v. Gregory, 16 F. (2) 589, 49 A.L.R. 1503

Hertz v. Mills, 10 F. supp. 979, affirmed 82 F. (2) 1010
18 Am. Jur. p. 168, sec. 53

The Complaint in the first action which begins on page 29 of this record and is marked defendant's exhibit A, alleges a breach of contract to pay disability benefits periodically, and a repudiation of the entire contract on the ground that insured disability did not occur while the policy was in full force and effect, and the prayer of the said complaint reads as follows:

"WHEREFORE, plaintiff demands judgment:

(a) That defendant be compelled to reinstate said policy as of December 10, 1928;

(b) That premiums due December 10, 1928, and all subsequent premiums, be waived by defendant;

(c) That defendant pay plaintiff $100.00 per month since October 1, 1928, with the legal rate of interest added on all delinquent payments, and that said payments of $100.00 per month be continued as long as plaintiff is totally and permanently disabled;

(d) And for reasonable damages suffered by plaintiff because of defendant's failure to perform its part of the said contract, and for his costs in this action, and for such other and further relief as to this honorable court may seem just and proper."

It will be observed that the main cause of action in the first Complaint is for money due on contract, and secondly, that defendant be compelled to pay plaintiff $100.00 per month as long as he is totally disabled, which doctors say will be until plaintiff's death.

It will also be observed that plaintiff did not institute proceedings to have policy declared in force, but for money due on contract and specific performance of contract over a period of years or until death.

Rule 86 of the New Rules of Federal Procedure provides that the effective date of the New Rules of Federal Procedure will be September 16, 1938, and it will be observed from the record herein, that the trial of the first action was July 25 and 26, 1938.

Rule 38 of the New Rules of Federal Procedure provide that the failure of a party to serve a demand as required by this Rule and to file it as required by Rule 5d, constitutes a waiver by him of trial by jury.

Prior to the effective date of the New Rules of Civil Procedure, 28 U. S. C.A. 770 and 773, was the law regarding trials by jury, which statutes read as follows:

> "The trial of Issues of Facts in all District Courts in all cases except Equity and in cases of Admiralty and Maritime Jurisdiction, except as otherwise provided in proceedings in bankruptcy, shall be by jury.
>
> "Issue of Fact in Civil cases in any district court may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of record file with the clerk, a stipulation in writing, or by oral stipulation entered in the record of the court waiving a jury."

It will be observed that there is no waiver of a trial by jury in the first action, which trial was about six or seven weeks prior to the effective date of the New Rules of Civil Procedure. And there is also an affidavit in the record of the Circuit Court of Appeals which states that insured demanded a trial by jury and that said demand was denied on the ground that the first action was a suit in equity.

CONCLUSION

Removing an action alleging breach of contract and demanding judgment for all money due on contract, from a State Court where there is a right to a trial by jury, to a Federal Court by defendant, and having Is-

sues of Fact determined by a Chancellor without a jury, where trial by jury has not been waived, invokes the jurisdiction of this court, pursuant to Rule 38, Paragraph 5.

WHEREFORE, petitioners pray that this action be reviewed on Writ of Certiorari and that the case be remanded to the trial court for a trial by jury on Issues of Fact.

This petition is presented because petitioners conscientiously believe they have been denied a righteous judgment based on Findings of Facts by a jury, contrary to Fundamental law and the public interest.

Respectfully submitted,

EDMOND L. VILES, Pro se

FRANCES N. VILES, Pro se

Petitioners.